Supreme Court, U.S.
FILED

941632 MAR 30 1995

OFFICE OF THE CLERK

No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BENJAMIN F. CADES, INDIVIDUALLY, AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

Petitioner,

v.

H & R BLOCK, INCORPORATED; BENEFICIAL NATIONAL BANK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

SUPPLEMENTAL APPENDIX

JOHN B. LONG
DYE, TUCKER, EVERITT, WHEALE & LONG
P.O. Box 2426
Augusta, Georgia 30903
(706) 722-0771

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

66 pp

TABLE OF CONTENTS

FEBRUARY 2, 1993 ORDER DENYING PLAINTIFFS' MOTION TO REMAND 1A

JULY 14, 1993 ORDER GRANTING BLOCK'S MOTION FOR SUMMARY JUDGMENT AS TO FIRST, FOURTH, FIFTH AND PARAGRAPHS (b) and (d) OF CADE'S THIRD CLAIM 5A

JULY 14, 1993 ORDER GRANTING BENEFICIAL'S MOTION FOR SUMMARY JUDGMENT AS TO FIRST, FOURTH, FIFTH AND PARAGRAPHS (b) and (d) OF CADE'S THIRD CLAIM 28A

AUGUST 17, 1993 ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION 45A

NOVEMBER 3, 1993 ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO TILA CLAIMS AND UNCONSCIONABILITY CLAIM AND MOTION FOR SUMMARY JUDGMENT AS TO COUNT III 48A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA FLORENCE DIVISION

C/A No. 4:92-1454-21

BENJAMIN F. CADE, individually, and on behalf of all persons similarly situated,

Plaintiffs,

v.

H & R BLOCK INCORPORATED; BENEFICIAL NATIONAL BANK,

Defendants.

ORDER

Before the court is the motion of the plaintiffs (collectively "Cade") to remand this case pursuant to 28 U.S.C. § 1447(c) on the grounds that this court lacks subject matter jurisdiction. I deny the motion to remand.

This action was originally filed in state court. Pursuant to 28 U.S.C. § 1446(a), the defendants ("H & R Block" & "Beneficial") timely removed this case on diversity jurisdiction grounds. 28 U.S.C. § 1332. Cade contends that the court lacks subject matter jurisdiction

because the amount in controversy does not exceed $50,000. I disagree.

In this case, not one of the claims of the individual plaintiffs exceeds $50,000. However, the amount in controversy is not solely determined by looking to the monetary claim of the plaintiff:

> It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the money judgment prayed, where such is the case, but in some case by the increased or diminished value of the property directly affected by the relief prayed, or by the pecuniary result to one of the parties immediately from the judgment.

Smith v. Adams, 130 U.S. 167, 175 (1889). More recently, the Second Circuit reaffirmed the principal announced in Smith: "We agree with the appellee that the amount in controversy is not necessarily the money judgment sought or recovered but rather the value of the consequences which may result from the litigation." Beacon Constru. Co. v. Matco Elec. Co., 521 F.2d 392, 399 (2nd Cir. 1975); accord Ronzio v. Denver & Rio Grande W. R.R. Co., 116 F.2d 604, 606 (10th Cir. 1940) ("In determining the matter in controversy, we may look to the object sought to be accomplished by the plaintiffs' complaint; the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce.") (footnote omitted). Moreover, there is authority in the District of

South Carolina for determining the amount in controversy from the viewpoint of either the plaintiff or the defendant. Congaree Broadcasters, Inc. v. TM Programming, Inc., 436 F. Supp. 258, 262 (D.S.C. 1977).

In addition to seeking monetary damages, Cade seeks to enjoin the defendants from charging alleged usurious interest on loans made in connection with the processing of income tax rapid refunds. If successful, the injunctive cost to the defendants would greatly exceed $50,000. Accordingly, the requirements for diversity jurisdiction exist because there is complete diversity of citizenship between the parties and the amount in controversy from the defendants' viewpoint exceeds $50,000. Smith, at 175; Beacon Constr., at 399; Ronzio, at 606; Congaree Broadcasters, at 262.

In any event, on June 12, 1992, Beneficial filed an amended notice of removal, which H & R Block joined, asserting federal question jurisdiction. Over three months later, Cade objected to the amended notice of removal on the grounds that it was untimely filed.

"The statutory time limit for removal is merely a formal and modal requirement and is not jurisdictional." Fristoe v. Reynolds Metals Co., 615 F.2d 1209, 1212 (9th Cir. 1980). Because time limit objections are not jurisdictional in nature, they are by necessity procedural in nature. See Baris v. Sulpico Lines, 932 F.2d 1540, 1544 (5th Cir.), cert. denied, 112 S.Ct. 430 (1991). A motion to remand based upon procedural defects must be

made within thirty days of the filing of the notice of removal. 28 U.S.C. § 1447(c).

Assuming, without deciding, that the amended notice of removal was untimely, this procedural defect was waived by Cade because Cade did not timely object as required by § 1447(c). Further, Cade did not raise the timeliness objection at a September 10, 1992 hearing on the issue of remand. Accordingly, Cade is precluded from objecting to the amended notice of removal at this late date. "Although the time limit is mandatory and a timely objection to a late petition will defeat removal, a party may waive the defect or be estopped from objecting to the untimeliness by sitting on his right." Fristoe, at 1212.

THEREFORE, the plaintiffs' motion to remand is denied. IT IS SO ORDERED.

_____

WILLIAM B. TRAXLER, JR.
UNITED STATES DISTRICT JUDGE

Greenville, South Carolina
February 2, 1993

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA FLORENCE DIVISION

C/A No. 4:92-1454-21

BENJAMIN F. CADE, individually, and on behalf of all persons similarly situated,

Plaintiffs,

v.

H & R BLOCK INCORPORATED; BENEFICIAL NATIONAL BANK,

Defendants.

O-R-D-E-R

Before the court is the renewed motion of the defendant H & R Block, Inc. ("Block") to dismiss or for summary judgment as to all claims of the plaintiffs (collectively "Cade").[1] Because matters outside the scope

---

[1]Block and defendant Beneficial National Bank have filed prior motions to dismiss Cade's action. On April 15, 1993, this court held a hearing on the motions to dismiss, but declined to rule on the motions at that time because Cade was granted leave to amend his complaint. At the April hearing, the court instructed the parties that

of the pleadings have been considered, Block's motion shall be treated as one for summary judgment. After reviewing the memoranda submitted by the parties, and after considering oral arguments, I grant the summary judgment motion of Block as to Cade's first, fourth, and fifth claims; and paragraphs (b) and (d) of the third claim.[2]

SUMMARY JUDGMENT STANDARD

Fed.R.Civ.P. 56(c) states, as to a party who has moved for summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.

Accordingly, to prevail on a motion for summary judgment, the movant must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) that he is entitled to judgment as a matter of law. As to the first

---

any renewed motion to dismiss would be treated as a motion for summary judgment.

[2]This court finds the memoranda submitted to be thorough and to preclude the necessity of additional oral argument. Local Rule 12.08, D.S.C.

of these determinations, a fact is deemed "material" if proof of its existence or nonexistence would affect the disposition of the case under the applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. Id. at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings; rather, he must demonstrate that specific, material facts exist which give rise to a genuine issue. Id. at 324. Accordingly, when Rule 56(e) has shifted the burden of proof to the non-movant, he must produce existence of every element essential to his action which he bears the burden of adducing at a trial on the merits.

Summary judgment serves the useful purpose of disposing of meritless claims before the court and the parties become entrenched in frivolous litigation. Donahue v. Windsor Locks Bd. of Fir Comm'rs, 834 F.2d 54, 58 (2nd Cir. 1987). Although summary judgment is an extreme remedy, the courts should not be

reluctant to grant summary judgment in appropriate cases; indeed, summary judgment is mandated where appropriate. Herman v. City of Chicago, 870 F.2d 400, 404 (7th Cir. 1989); Mieri v. Dacon, 759 F.2d 989, 998 (2nd Cir. 1985), cert. denied, 474 U.S. 829 (1985); United States v. Porter, 581 F.2d 698, 703 (8th Cir. 1978); Estate of Detwiler v. Offenbecher, 728 F.Supp. 103, 134 (S.D.N.Y. 1989); Burleson v. Illinois Farmers Ins., 725 F.Supp. 1489, 1490 (S.D. Ind. 1989). In a recent trilogy of decisions--Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986)--the Supreme Court has consistently reaffirmed its endorsement of pretrial resolution and summary disposition of baseless actions. These decisions reflect the mandatory nature of Rule 56. In Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the Court held:

> The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'...Rule 56 must be construed with due regard not only for the rights of person asserting claims and

> **defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of person opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.**

Id. at 327 (citations omitted).

FACTS

The following facts are undisputed. Block is a corporation which offers tax consultation and preparation services nationwide through a network of retail offices operated by Block or its franchisees. (Affidavit of Edward B. Feinstein, ¶ 2.)[3] Defendant Beneficial National Bank ("Beneficial") is a full service national banking association with its charter address and headquarters in Wilmington, Delaware. (Affidavit of Wheeler K. Neff, ¶ 2.)[4] Beneficial has not established, nor attempted to establish, any branch banks outside of

---

[3]Feinstein is the Assistant Vice President and Director of Field Automated Systems of H&R Block Tax Services, Inc. and H&R Block Eastern Tax Services, Inc. H&R Block Eastern Tax Services, Inc. is a wholly-owned subsidiary of H&R Block Tax Services, Inc. In turn, H&R Block Tax Services, Inc. is a wholly-owned subsidiary of Block.

[4]Neff is Senior Vice President of Beneficial. The facts refer to the latest affidavits of Neff and Feinstein both of which were filed on June 11, 1993.

Delaware. (Id. ¶ 13.) Block and Beneficial are separate and distinct corporations that are not affiliated. (Feinstein Aff. ¶ 7.) Moreover, Beneficial employees do not work in Block's offices, nor does Beneficial exercise any control or supervision over Block's operations. Additionally, Beneficial does not advertise in Block's offices, or pay rent in any form to Block. (Neff. Aff. ¶¶ 7-11.); (Feinstein Aff. ¶¶ 13-14-).

Block like countless other tax services across the nation, offers its customers electronic filing of federal income tax returns through its rapid refund program. In connection with its rapid refund program, Block and Beneficial entered into an agreement whereby Beneficial agreed to loan qualified Block customers the amount of a taxpayer's expected tax refund (Neff Aff. ¶ 3.), less a $29 finance charge.[5] Although Beneficial's loan documents are filled out in Block's offices, the loan application information is electronically forwarded to Beneficial's Delaware offices where Beneficial itself determines whether to make the refund anticipation loan. (Neff Aff. ¶¶ 4-6); (Feinstein Aff. ¶¶ 8-11.) If the loan is approved, a Beneficial cashier's check is issued to the customer. (Neff Aff. ¶ 6.) With regard to the refund

[5]The $29 finance charge is a flat fee which does not vary with size of the loan, and is expressly provided for in Beneficial's loan documents. (Neff Aff. ¶ 12.)

anticipation loan program, Block is not a lender. (Feinstein Aff. ¶ 6.)[6]

Cade brought this action against Block and Beneficial alleging a variety of state and federal claims. At the heart of this case, however, there is but one complaint. Essentially, Cade contends that Beneficial, through Block (Beneficial's "branch office"), charges usurious rates of interest on the refund anticipation loans.

DISCUSSION

In his amended complaint, Cade asserts five claims against Block and Beneficial: (1) 12 U.S.C. § 85 claim; (2) federal Truth in Lending Act claim; (3) state law unconscionability claim; (4) state law unfair or deceptive trade practices claim; and (5) a claim that the defendants failed to comply with an assortment of state supervised lender laws. In short, all five of Cade's claims allege that Block and Beneficial, acting in their capacity as lenders, violated numerous federal and state laws.

Block, however, is not a lender in the refund anticipation loan transaction. Instead the undisputed facts show that Block acts as Beneficial's disclosed agent. Block employees simply assist its customers in completing

---

[6]Block charges all of its customers a tax preparation fee, and charges an additional fee for electronic filing of income tax returns. (Feinstein Aff. ¶ 15.) As a result, a customer who obtains a refund anticipation loan must pay a $29 finance charge to Beneficial and a $35 electronic processing fee to Block.

Beneficial loan applications for Beneficial refund anticipation loans, which if approved by Beneficial, are issued on a Beneficial cashier's check. Cade's amended complaint admits as much:

> 3. The rapid refund program of the defendant, H&R Block, Inc. was in reality, a loan made to the named plaintiff by defendant, Beneficial National Bank, Inc., through the defendant, H&R Block, Inc. acting as agent for defendant, Beneficial National Bank, Inc.

(Plaintiffs' Amended Complaint at 3.) (emphasis added)

> 2. The named plaintiff is informed and believes that defendant, Beneficial National Bank, Inc. both directly, and acting through its agent, H&R Block, Inc., engages in the business of a supervised lender under the laws and regulations of the State of South Carolina.

(Pls.' Am. Compl. at 8.) (emphasis added)

Cade contracted with Beneficial, through its agent Block, to obtain a refund anticipation loan. Essentially, Cade now contends that a term of his contract (the interest rate charged) violated a variety of state and federal laws and seeks redress from both Block and Beneficial. At all times, however, Block was acting

within the scope of its agency for a disclosed principal (Beneficial).[7]

Block argues that "[a]s an agent for a disclosed principal in these transactions, Block cannot be held liable for any of the alleged violations." (Memorandum of Law in Support of H&R Block, Inc.'s Motion to Dismiss or for Summary Judgment at 5.) More precisely, as an agent for a disclosed principal, Block cannot be held liable for breach of contract. Skinner & Ruddock, Inc. v. London Guarantee and Accident Co., 239 S.C. 614, 124 S.E.2d 1789, 180 (1962). Cade, however, is not suing for breach of contract; therefore, the aforementioned rule of agency law is not controlling. However, fundamental agency principles are applicable in this case. Indeed, it is axiomatic that if Beneficial has complied with all applicable federal and state laws, Block is likewise in compliance with such laws. Accordingly, the following discussion focuses primarily on the activities of Beneficial.

I. 12 U.S.C. § 85 claim.

In his first claim, Cade contends that the $29 interest charge levied by Beneficial is "grossly in excess of the rate allowed by" Section 85 of the National Bank Act,

---

[7]Cade's deposition also shows that he understood that Beneficial was the lender (principal) in the refund anticipation loan transaction. (Cade Dep. at 9, lines 15-19); (Cade Dep. at 12-13, lines 22-25, 1-2).

12 U.S.C. § 21 et seq.[8] Under 12 U.S.C. § 85, a national banking association, such as Beneficial, may charge any interest rate, so long as the rate charged complies with the usury laws of the state whether the national bank is located: "Any [national banking] association may. . .charge on any loan. . .interest at the rate allowed by the laws of the State. . .where the bank is located. . . ." Id. A national bank is "located" for § 85 purposes in the state where the bank has its charter address. Marquette Nat. Bank of Minneapolis v. First of Omaha Serv., 439 U.S. 299, 310 (1978).

Beneficial's charter address is Wilmington, Delaware. Accordingly, Beneficial is located in Delaware for § 85 purposes, and may extend credit to South Carolina residents at any interest rate allowed by Delaware law. Id. at 313 ("Since Omaha Bank and its BankAmericard program are 'located' in Nebraska, the plain language of § 85 provides that the bank may charge 'on any loan' the rate 'allowed' by the State of Nebraska.") Under Delaware law, a bank may charge "[l]oan fees, points, finders fees and other front-end and periodic charges" so long as the charges are provided for in the loan documents. Del. Code Ann. tit. 5, § 965. Beneficial's loan documents expressly provide for the collection of the $29 charge.[9] Thus, Beneficial's flat $29

---

[8](Pls.'Am.Compl. at 4.)

[9]Numerous federal courts have construed the term "interest" in § 85 as encompassing "a variety of lender-imposed fees and financial requirements which are independent of numerical percentage rate."

charge on refund anticipation loans is permitted under Delaware law, and, therefore, allowed under 12 U.S.C. § 85.[10]

Moreover, the fact that Beneficial extends credit to South Carolina residents does not alter its "location" for § 85 purposes:

> If the location of the bank were to depend on the whereabouts of each credit-card transaction, the meaning of the term "located" would be so stretched as to throw into confusion the complex system of modern interstate banking. A national bank could never be certain whether its contacts with residents of foreign States were sufficient to alter its location for purposes of § 85. The mere fact that Omaha Bank has enrolled Minnesota residents, merchants, and banks in its BankAmericard program thus does not suffice to "locate" that bank in Minnesota for purposes of 12 U.S.C. § 85.

Greenwood Trust Co. v. Com. of Mass., 971 F.2d 818, 829 (1st Cir. 1992) (citing several cases that have expanded the preemptive scope of § 85), cert. denied, ___ U.S. ___, 113 S.Ct. 974 (1993).

[10]Under Delaware law a bank may charge interest at any rate or rates agreed to by the parties. Del. Code Ann. tit. 5, §§ 963-964. Thus, even if the $29 interest charge were considered a varying interest rate (since the charge remains the same regardless of the loan amount) the court would reach the same conclusion.

Marquette, at 312-13.

II. Unconscionability claim.

In his third claim, Cade asserts that the loan practices of the defendants "are unconscionable within the meaning of § 37-5-108 of the South Carolina Code." Under S.C. Code Ann. § 37-5-108 (Law. Co-op. 1989), a court can declare a consumer credit transaction unconscionable and, inter alia, award treble damages. Beneficial has moved for summary judgment as to paragraph (b) and (d) of Cade's third claim. In paragraph (8b), Cade alleges that there is a "gross disparity between the price of the services obtained and the value of the services." Paragraph (d) alleges that "[t]he charges substantially exceed the usual and customary charge for this type of consumer credit transaction."[11]

Beneficial contends that paragraph (b) and (d) of Cade's third claim are preempted by 12 U.S.C. § 85. I agree. Essentially, these paragraphs allege that Beneficial violated § 37-5-108 by charging rates of interest that are usurious under South Carolina law. As a nationally chartered bank located in Delaware, Beneficial is not subject to South Carolina laws that regulate the amount of interest a bank may charge.[12] Pursuant to 12 U.S.C. § 85, Beneficial, in extending credit to South Carolina

---

[11](Pls.' Am. Comp. at 5-6.)

[12]See supra part I.

residents, may "export" the interest rate allowed by Delaware:

> In the very recent case of Fisher v. First Nat'l Bank of Chicago, 538 F.2d 1284 (7th Cir. 1976), [cert. denied, 429 U.S. 1062 (1977)], it was held that under the provisions of § 85, if a national bank in one state makes a loan in another state in which it is doing business, and if there is a differential between the maximum rate allowable in one state and the maximum rate allowable in the other state with respect to the same class of debt, the bank may charge the higher of the two rates.

We find ourselves in agreement with that holding. Fisher v. First Nat. Bank of Omaha, 548 F.2d 255, 257-58 (8th Cir. 1977).

Cade contends that the § 85 cases relied on by Beneficial (such as Marquette and Fisher) are distinguishable because they are "credit card" cases and the refund anticipation loans, by contract, involve a "face-to-face" transaction.[13] This is a distinction without a difference. Simply stated, § 85 "acts as a cowcatcher by brushing aside states' attempts to regulate 'interest rates' charged by national banks. Included within those displaced state laws are regulations regarding flat fees. .

---

[13](Brief in Opposition to Defendants' Motion to Dismiss or for Summary Judgment at 13-17.)

. ." Greenwood Trust Co., 971 F.2d at 831. Additionally, the rationale for the Court's holding in Marquette--maintaining uniformity in the "complex system of modern interstate banking"--applies with equal force to the "location" of a national bank (for § 85 purposes) that makes "face-to-face loans in several states.

III. Unfair Trade Practices claim.

Cade's fourth claim alleges that the refund anticipation loan program violates the South Carolina Unfair Trade Practice Act ("UTPA"), S.C. Code Ann. § 39-5-10 to -160 (Law. Co-op. 1976).[14] The UTPA broadly proscribes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. Code Ann. § 39-5-20(a) (Law. Co-op. 1976). The UTPA, however, does not apply to "[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States. . . ." S.C. Code Ann. § 39-5-40(a) (Law. Co-op. 1976).

The Supreme Court of South Carolina has stated that the exemption found in § 39-5-40(a) of the UTPA "is intended to exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes." Ward v. Dick Dyer & Assocs., 304 S.C. 152, 403 S.E.2d 310, 312 (1991). "The purpose of the exemption is to insure that a business is not subject to a

[14](Pls.' Am. Compl. at 7.)

lawsuit under the Act when it does something. . .that would otherwise be a violation of the Act, but which is allowed under other statutes or regulations." Id. (quoting with approval Skinner v. Steele, 730 S.W.2d 335, 337 (Tenn. Ct. App. 1987).

The refund anticipation loans are extensively regulated by federal lending laws and the regulations promulgated thereunder.[15] More importantly, the $29 fee charged on a refund anticipation loan is allowed by § 85 of the National Bank Act. As such, Cade's UTPA claim is based upon loan activity that is expressly permitted (and regulated) under federal law, and therefore the alleged unfair conduct falls within an exemption to the UTPA. Ward, at 312; NCNB Nat. Bank of north Carolina v. Tiller, 814 F.2d 931, 937 (4th Cir. 1987), overruled on other grounds, Busby v. Crown Supply, Inc., 896 F.2d 833, 840-41 (4th Cir. 1990) (en banc portion of opinion).[16]

IV. "Posting and Filing" claim.

In his fifth claim, Cade alleges that Beneficial, as a supervised lender under the laws of South Carolina,

---

[15]A comprehensive scheme of consumer lending disclosure requirements is set forth in the Truth in Lending Act, 15 U.S.C. § 1601 et seq., as implemented by Regulation Z, 12 C.F.R. § 226.1 et seq.

[16]Additionally, to the extent the alleged UTPA violations arise out of the interest rate charged by Beneficial, Cade's claim is preempted by 12 U.S.C. § 85. See supra parts I and II.

failed to file and post its finance charge schedule as required by S.C. Code Ann. § 37-3-305) (Law. Co-op. 1989 & Cum Supp. 1992). As a result of its failure to file and post, Beneficial is allegedly prohibited from charging more than 18% interest on a refund anticipation loan by S.C. Code Ann. § 37-3-201 (Law. Co-op. 1989).[17] The relevant portion of § 37-3-201 states:

> (2) With respect to a consumer loan[18]. . .a supervised lender may contract for and receive a loan finance charge. . .not exceeding the greater of the following:
>
> (a) any rate filed and posted pursuant to § 37-3-305; or
>
> (b) eighteen percent per year on the unpaid balances of principal.

S.C. Code Ann. § 37-3-201(2) (emphasis added).

---

[17](Pls.' Am. Compl. at 8.)

[18]S.C. Code Ann. § 37-3-104 (Law Co-op. Cum. Supp. 1992) defines a consumer loan as "a loan made by a person regularly engaged in the business of making loans." Block is not a lender, nor is Block "regularly engaged in the business of making loans." Therefore, Block is not in the consumer loan business, and § 37-3-201 has no application.

Initially, the court notes that Cade's fifth claim is merely another way of attempting to impose South Carolina's usury laws upon Beneficial. However, Delaware's usury laws govern the refund anticipation loans. Accordingly, insofar as these statutes, §§ 37-3-305 and 37-3-201(2), attempt to impose an interest rate limitation on a national banking association, they are preempted by § 85 of the National Bank Act. See supra parts I and II.

One of the powers expressly granted to national banks by Congress is the power to lend money. 12 U.S.C. § 24 (Seventh). Congress, with limited exceptions, has granted the Office of the Comptroller of the Currency ("OCC") supervisory and enforcement authority over the affairs of national banks. 12 U.S.C. § 481. The exercise of the OCC's authority cannot be subject to state approval or regulation because to do so would allow the states to condition or restrict a national bank's power to engage in otherwise legal lending activity. As stated by the United States Supreme Court almost 100 years ago:

> [N]ational banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduction of their affairs is absolutely void wherever such attempted exercise of authority expressly conflicts with the laws

> of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal government to discharge the duties of the performance of which they were created.

McClellan v. Chipman, 164 U.S. 347, 357 (1896) (quoting Davis v. Elmira Savings Bank, 161 U.S. 275 (1896)). Therefore, South Carolina cannot control, by its posting and filing requirements, the interest rates charged by Beneficial.

Additionally, this court notes that in Marquette, the Supreme Court recognized that federal banking laws do inhibit the states' ability to regulate interest rates. The Court, however, stated that it was within the exclusive providence of Congress, and not the courts, to alter this situation:

> Petitioners' final argument is that the "exportation" of interest rates. . .will significantly impair the ability of States to enact effective usury laws. This impairment, however, has always been implicit in the structure of the National Bank Act, since citizens of one State were free to visit a neighboring State to receive credit at foreign interest rates. . . . But the protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better

> addressed to the wisdom of Congress than to the judgment of this Court.

Id. at 318-19 (citation and footnote omitteD). In a similar manner, Cade is petitioning the wrong forum if he wishes to impose a state's usury laws on a national banking association.

V. Irrelevancy of "Branch" Argument.[19]

The bulk of Cade's brief is devoted to the repeated argument that Block operates as a "branch" of Beneficial, as that term is defined in 12 U.S.C. § 36(f).[20] Therefore, according to Cade, Beneficial--via Block--is loaning money in South Carolina and this in-state loan activity triggers the application of the South Carolina Consumer Protection Code.[21]

---

[19]It is the conclusion of this court that parts I through IV of this order more than adequately address and dispose of Cade's first, third (¶¶ (b) & (d) only), fourth, and fifth claims. However, out of an abundance of caution, the court will elaborate on Cade's "branch" theory.

[20]This section provides that "[t]he term 'branch'. . .shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business. . .at which deposits are received, or checks paid, or money lent." Id.

[21](Brief in Opposition to Defendants' Motion to Dismiss or for Summary Judgment at 7.)

Cade's "branch" argument is primarily based on his understanding of First National Bank in Plant City, Florida v. Dickinson, 396 U.S. 122 (1969). In Dickinson, the Supreme Court held that an armored car owned and operated by a national banking association, at which customers could make deposits and cash checks, constituted a branch under 12 U.S.C. § 36(f). The court's holding is not surprising when the following facts are considered:

> The armored car was owned and controlled by the bank; the teller and driver-guard in the car were bank employees. The bank paid the cost of armored car operations and assumed complete responsibility for the monies, checks, and deposits during transit. . . .The truck bore the name of the bank. . . .All movements and routing of the armored car were directed by the bank.

Id. at 128.

In contrast, Block and Beneficial are nonaffiliated corporations that are completely autonomous--one is a bank, the other a tax service. Block's operations are not owned, controlled, or paid for by Beneficial. Beneficial employees do not work in Block's offices. Block's offices are not advertised as offices of Beneficial. To assert that Block is a "branch" of Beneficial merely because a customer picks up a Beneficial check in a Block office elevates form over substance.

Moreover, in the aftermath of Dickinson, courts faced with the issue of determining what constitutes a "branch" under § 36, have conducted a two-part inquiry. First, a court determines whether a national bank has established a branch under 12 U.S.C. § 36(c) by owning or renting a facility. If a branch has been established, the court then conducts a § 36(f) examination--are deposits received, checks paid, or money lent at this facility? Independent Banks Assoc. v. Marine Midland Bank, 757 F.2d 453, 456-463 (2nd Cir. 1985), cert. denied, 476 U.S. 1186 (1986); Independent Banks Assoc. v. Smith, 534 F.2d 921, 951-952 (D.C. Cir.), cert. denied, 429 U.S. 862 (1976). Beneficial does not own, rent, or otherwise control Block's offices. Accordingly, Block's offices are not established by Beneficial under § 36(c). As such, this court does not reach the § 36(f) issue.

Cade contends that a ruling in favor of the defendants "would greatly expand Marquette. . .overrule [Dickinson]. . .and make it so that states could have no control over what interest rates were being charged their customers. . . ."[22] I disagree. Section 85 plainly provides that a national bank may charge interest "on any loan" at the rate allowed by the laws of the state whether the bank is "located." A national bank is "located" for § 85 purposes in the state whether the bank has its charter address. Marquette, 439 U.S. at 310. This order simply applies § 85 as interpreted by the Supreme Court. Further, the Dickinson case has

---

[22](Brief in Opposition to Defendants' Motion to Dismiss or for Summary Judgement at 18.)

absolutely nothing do with the exportation of interest rates under § 85: "In this case we are called upon to construe. . .12 U.S.C. § 36 as it relates to the definition of a branch bank. . . ." Dickinson, at 124. Additionally, Marquette squarely rejected Cade's states' rights plea: "[T]he protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this court." Id. at 319.

Finally, it is immaterial whether Block's South Carolina offices are considered "branches" of Beneficial. As discussed above, a national bank is "located" where it has its charter address regardless of whether the bank operates branches in several states. Accordingly, even if Block's offices were considered "branches" of Beneficial, Delaware's usury laws would still apply.

THEREFORE, IT IS ORDERED that the motion of Block for summary judgment as to the first, fourth, and fifth claims of Cade is **granted.**

IT IS FURTHER ORDERED that the motion of Block for summary judgment as to paragraphs (b) and (d) of Cade's third claim is **granted.**

IT IS SO ORDERED.[23]

---

[23]The court reserves ruling on Block's motion to dismiss Cade's prayer for punitive damages. The parties may submit, within ten days of the filing of this order, additional memoranda specifically addressing the punitive damages issue with respect to the remaining

WILLIAM B. TRAXLER, JR.
UNITED STATES DISTRICT JUDGE

Greenville, South Carolina
July 14, 1993.

---

claims.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA FLORENCE DIVISION

C/A No. 4:92-1454-21

BENJAMIN F. CADE, individually, and on behalf of all persons similarly situated,

Plaintiffs,

v.

H & R BLOCK INCORPORATED; BENEFICIAL NATIONAL BANK,

Defendants.

O-R-D-E-R

Before the court is the renewed motion of the defendant Beneficial National Bank ("Beneficial") to dismiss or for summary judgment as to the first, fourth, fifth, and paragraphs (b) and (d) of the third claim of the plaintiffs (collectively "Cade").[1] Because matters outside

---

[1]Beneficial and defendant H&R Block, Inc. have filed prior motions to dismiss Cade's action. On April 15, 1993, this court held a hearing on the motions to dismiss, but declined to rule on the

the scope of the pleadings have been considered, Beneficial's motion shall be treated as one for summary judgment. After reviewing the memoranda submitted by the parties, and after considering oral arguments, I grant the summary judgment motion of Beneficial.[2]

SUMMARY JUDGMENT STANDARD

Fed.R.Civ.P. 56(c) states, as to a party who has moved for summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.

Accordingly, to prevail on a motion for summary judgment, the movant must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) that he is entitled to judgment as a matter of law. As to the first of these determinations, a fact is deemed "material" if

---

motions at that time because Cade was granted leave to amend his complaint. At the April hearing, the court instructed the parties that any renewed motion to dismiss would be treated as a motion for summary judgment.

[2]This court finds the memoranda submitted to be thorough and to preclude the necessity of additional oral argument. Local Rule 12.08, D.S.C.

proof of its existence or nonexistence would affect the disposition of the case under the applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. Id. at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings; rather, he must demonstrate that specific, material facts exist which give rise to a genuine issue. Id. at 324. Accordingly, when Rule 56(e) has shifted the burden of proof to the non-movant, he must produce existence of every element essential to his action which he bears the burden of adducing at a trial on the merits.

Summary judgment serves the useful purpose of disposing of meritless claims before the court and the parties become entrenched in frivolous litigation. Donahue v. Windsor Locks Bd. of Fir Comm'rs, 834 F.2d 54, 58 (2nd Cir. 1987). Although summary judgment is an extreme remedy, the courts should not be reluctant to grant summary judgment in appropriate

cases; indeed, summary judgment is mandated where appropriate. Herman v. City of Chicago, 870 F.2d 400, 404 (7th Cir. 1989); Mieri v. Dacon, 759 F.2d 989, 998 (2nd Cir. 1985), cert. denied, 474 U.S. 829 (1985); United States v. Porter, 581 F.2d 698, 703 (8th Cir. 1978); Estate of Detwiler v. Offenbecher, 728 F.Supp. 103, 134 (S.D.N.Y. 1989); Burleson v. Illinois Farmers Ins., 725 F.Supp. 1489, 1490 (S.D. Ind. 1989). In a recent trilogy of decisions--Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986)--the Supreme Court has consistently reaffirmed its endorsement of pretrial resolution and summary disposition of baseless actions. These decisions reflect the mandatory nature of Rule 56.

In Celotex Corp. v. Catrett, 477 U.S. 317 (1986), the Court held:

> The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'. . .Rule 56 must be construed with due regard not only for the rights of person asserting claims and

> **defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.**

Id. at 327 (citations omitted).

FACTS

The following facts are undisputed. Defendant H&R Block ("Block") is a corporation which offers tax consultation and preparation services nationwide through a network of retail offices operated by Block or its franchisees. (Affidavit of Edward B. Feinstein, ¶ 2.)[3] Beneficial is a full service national banking association with its charter address and headquarters in Wilmington, Delaware. (Affidavit of Wheeler K. Neff, ¶ 2.)[4] Beneficial has not established, nor attempted to establish, any branch banks outside of Delaware. (Id. ¶ 13.) Block

---

[3]**Feinstein is the Assistant Vice President and Director of Field Automated Systems of H & R Block Tax Services, Inc. and H & R Block Eastern Tax Services, Inc. H&R Block Eastern Tax Services, Inc. is a wholly-owned subsidiary of H&R Block Tax Services, Inc. In turn, H&R Block Tax Services, Inc. is a wholly-owned subsidiary of Block.**

[4]**Neff is Senior Vice President of Beneficial. The facts refer to the latest affidavits of Neff and Feinstein both of which were filed on June 11, 1993.**

and Beneficial are separate and distinct corporations that are not affiliated. (Feinstein Aff. ¶ 7.) Moreover, Beneficial employees do not work in Block's offices, nor does Beneficial exercise any control or supervision over Block's operations. Additionally, Beneficial does not advertise in Block's offices, or pay rent in any form to Block. (Neff. Aff. ¶¶ 7-11.); (Feinstein Aff. ¶¶ 13-14-).

Block like countless other tax services across the nation, offers its customers electronic filing of federal income tax returns through its rapid refund program. In connection with its rapid refund program, Block and Beneficial entered into an agreement whereby Beneficial agreed to loan qualified Block customers the amount of a taxpayer's expected tax refund (Neff Aff. ¶ 3.), less a $29 finance charge.[5] Although Beneficial's loan documents are filled out in Block's offices, the loan application information is electronically forwarded to Beneficial's Delaware offices where Beneficial itself determines whether to make the refund anticipation loan. (Neff Aff. ¶¶ 4-6); (Feinstein Aff. ¶¶ 8-11.) If the loan is approved, a Beneficial cashier's check is issued to the customer. (Neff Aff. ¶ 6.) With regard to the refund anticipation loan program, Block is not a lender. (Feinstein Aff. ¶ 6.)[6]

---

[5]The $29 finance charge is a flat fee which does not vary with size of the loan, and is expressly provided for in Beneficial's loan documents. (Neff Aff. ¶ 12.)

[6]Block charges all of its customers a tax preparation fee, and charges an additional fee for electronic filing of income tax returns. (Feinstein Aff. ¶ 15.) As a result, a customer who obtains a refund

Cade brought this action against Block and Beneficial alleging a variety of state and federal claims. At the heart of this case, however, there is but one complaint. Essentially, Cade contends that Beneficial, through Block (Beneficial's "branch office"), charges usurious rates of interest on the refund anticipation loans.

DISCUSSION

In his amended complaint, Cade asserts five claims against Block and Beneficial: (1) 12 U.S.C. § 85 claim; (2) federal Truth in Lending Act claim; (3) state law unconscionability claim; (4) state law unfair or deceptive trade practices claim; and (5) a claim that the defendants failed to comply with an assortment of state supervised lender laws. Beneficial seeks summary judgment as to the first, fourth, fifth, and portions of Cade's third claim.

I. 12 U.S.C. § 85 claim.

In his first claim, Cade contends that the $29 interest charge levied by Beneficial is "grossly in excess of the rate allowed by" Section 85 of the National Bank Act, 12 U.S.C. § 21 et seq.[7] Under 12 U.S.C. § 85, a national banking association, such as Beneficial, may charge any interest rate, so long as the rate charged complies with

---

anticipation loan must pay a $29 finance charge to Beneficial and a $35 electronic processing fee to Block.

[7](Plaintiffs' Amended Complaint at 4.)

the usury laws of the state where the national bank is located: "Any [national banking] association may. . .charge on any loan. . .interest at the rate allowed by the laws of the State. . .where the bank is located. . . ." Id. A national bank is "located" for § 85 purposes in the state where the bank has its charter address. Marquette Nat. Bank of Minneapolis v. First of Omaha Serv., 439 U.S. 299, 310 (1978).

Beneficial's charter address is Wilmington, Delaware. Accordingly, Beneficial is located in Delaware for § 85 purposes, and may extend credit to South Carolina residents at any interest rate allowed by Delaware law. Id. at 313 ("Since Omaha Bank and its BankAmericard program are 'located' in Nebraska, the plain language of § 85 provides that the bank may charge 'on any loan' the rate 'allowed' by the State of Nebraska.") Under Delaware law, a bank may charge "[l]oan fees, points, finders fees and other front-end and periodic charges" so long as the charges are provided for in the loan documents. Del. Code Ann. tit. 5, § 965. Beneficial's loan documents expressly provide for the collection of the $29 charge.[8] Thus, Beneficial's flat $29 charge on refund anticipation loans is permitted under

---

[8]Numerous federal courts have construed the term "interest" in § 85 as encompassing "a variety of lender-imposed fees and financial requirements which are independent of numerical percentage rate." Greenwood Trust Co. v. Com. of Mass., 971 F.2d 818, 829 (1st Cir. 1992) (citing several cases that have expanded the preemptive scope of § 85), cert. denied, ___ U.S. ___, 113 S.Ct. 974 (1993).

Delaware law, and, therefore, allowed under 12 U.S.C. § 85.[9]

Moreover, the fact that Beneficial extends credit to South Carolina residents does not alter its "location" for § 85 purposes:

> If the location of the bank were to depend on the whereabouts of each credit-card transaction, the meaning of the term "located" would be so stretched as to throw into confusion the complex system of modern interstate banking. A national bank could never be certain whether its contacts with residents of foreign States were sufficient to alter its location for purposes of § 85. The mere fact that Omaha Bank has enrolled Minnesota residents, merchants, and banks in its BankAmericard program thus does not suffice to "locate" that bank in Minnesota for purposes of 12 U.S.C. § 85.

Marquette, at 312-13. Accordingly, Beneficial's motion for summary judgment as to Cade's first claim shall be granted.

---

[9]Under Delaware law a bank may charge interest at any rate or rates agreed to by the parties. Del. Code Ann. tit. 5, §§ 963-964. Thus, even if the $29 interest charge were considered a varying interest rate (since the charge remains the same regardless of the loan amount) the court would reach the same conclusion.

II. Unconscionability claim.

In his third claim, Cade asserts that the loan practices of the defendants "are unconscionable within the meaning of § 37-5-108 of the South Carolina Code." Under S.C. Code Ann. § 37-5-108 (Law. Co-op. 1989), a court can declare a consumer credit transaction unconscionable and, inter alia, award treble damages. Beneficial has moved for summary judgment as to paragraph (b) and (d) of Cade's third claim. In paragraph (8b), Cade alleges that there is a "gross disparity between the price of the services obtained and the value of the services." Paragraph (d) alleges that "[t]he charges substantially exceed the usual and customary charge for this type of consumer credit transaction."[10]

Beneficial contends that paragraph (b) and (d) of Cade's third claim are preempted by 12 U.S.C. § 85. I agree. Essentially, these paragraphs allege that Beneficial violated § 37-5-108 by charging rates of interest that are usurious under South Carolina law. As a nationally chartered bank located in Delaware, Beneficial is not subject to South Carolina laws that regulate the amount of interest a bank may charge.[11] Pursuant to 12 U.S.C. § 85, Beneficial, in extending credit to South Carolina residents, may "export" the interest rate allowed by Delaware:

---

[10](Pls.' Am. Comp. at 5-6.)

[11]See supra part I.

> In the very recent case of Fisher v. First Nat'l Bank of Chicago, 538 F.2d 1284 (7th Cir. 1976), [cert. denied, 429 U.S. 1062 (1977)], it was held that under the provisions of § 85, if a national bank in one state makes a loan in another state in which it is doing business, and if there is a differential between the maximum rate allowable in one state and the maximum rate allowable in the other state with respect to the same class of debt, the bank may charge the higher of the two rates.

We find ourselves in agreement with that holding. Fisher v. First Nat. Bank of Omaha, 548 F.2d 255, 257-58 (8th Cir. 1977).

Cade contends that the § 85 cases relied on by Beneficial (such as Marquette and Fisher) are distinguishable because they are "credit card" cases and the refund anticipation loans, by contract, involve a "face-to-face" transaction.[12] This is a distinction without a difference. Simply stated, § 85 "acts as a cowcatcher by brushing aside states' attempts to regulate 'interest rates' charged by national banks. Included within those displaced state laws are regulations regarding flat fees. . . ." Greenwood Trust Co., 971 F.2d at 831. Additionally, the rationale for the Court's holding in Marquette--maintaining uniformity in the "complex

---

[12](Brief in Opposition to Defendants' Motion to Dismiss or for Summary Judgment at 13-17.)

system of modern interstate banking"--applies with equal force to the "location" of a national bank (for § 85 purposes) that makes "face-to-face loans in several states.

III. Unfair Trade Practices claim.

Cade's fourth claim alleges that the refund anticipation loan program violates the South Carolina Unfair Trade Practice Act ("UTPA"), S.C. Code Ann. § 39-5-10 to -160 (Law. Co-op. 1976).[13] The UTPA broadly proscribes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. Code Ann. § 39-5-20(a) (Law. Co-op. 1976). The UTPA, however, does not apply to "[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States. . . ." S.C. Code Ann. § 39-5-40(a) (Law. Co-op. 1976).

The Supreme Court of South Carolina has stated that the exemption found in § 39-5-40(a) of the UTPA "is intended to exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes." Ward v. Dick Dyer & Assocs., 304 S.C. 152, 403 S.E.2d 310, 312 (1991). "The purpose of the exemption is to insure that a business is not subject to a lawsuit under the Act when it does something. . .that would otherwise be a violation of the Act, but which is allowed under other statutes or regulations." Id. (quoting

---

[13](Pls.' Am. Compl. at 7.)

with approval Skinner v. Steele, 730 S.W.2d 335, 337 (Tenn. Ct. App. 1987).

The refund anticipation loans are extensively regulated by federal lending laws and the regulations promulgated thereunder.[14] More importantly, the $29 fee charged on a refund anticipation loan is allowed by § 85 of the National Bank Act. As such, Cade's UTPA claim is based upon loan activity that is expressly permitted (and regulated) under federal law, and therefore the alleged unfair conduct falls within an exemption to the UTPA. Ward, at 312; NCNB Nat. Bank of north Carolina v. Tiller, 814 F.2d 931, 937 (4th Cir. 1987), overruled on other grounds, Busby v. Crown Supply, Inc., 896 F.2d 833, 840-41 (4th Cir. 1990) (en banc portion of opinion).[15]

IV. "Posting and Filing" claim.

In his fifth claim, Cade alleges that Beneficial, as a supervised lender under the laws of South Carolina, failed to file and post its finance charge schedule as required by S.C. Code Ann. § 37-3-305) (Law. Co-op. 1989 & Cum Supp. 1992). As a result of its failure to file

---

[14]A comprehensive scheme of consumer lending disclosure requirements is set forth in the Truth in Lending Act, 15 U.S.C. § 1601 et seq., as implemented by Regulation Z, 12 C.F.R. § 226.1 et seq.

[15]Additionally, to the extent the alleged UTPA violations arise out of the interest rate charged by Beneficial, Cade's claim is preempted by 12 U.S.C. § 85. See supra parts I and II.

and post, Beneficial is allegedly prohibited from charging more than 18% interest on a refund anticipation loan by S.C. Code Ann. § 37-3-201 (Law. Co-op. 1989).[16] The relevant portion of § 37-3-201 states:

> (2) With respect to a consumer loan. . .a supervised lender may contract for and receive a loan finance charge. . .not exceeding the greater of the following:
>
> (a) any rate filed and posted pursuant to § 37-3-305; or
>
> (b) eighteen percent per year on the unpaid balances of principal.

Id.

Initially, the court notes that Cade's fifth claim is merely another way of attempting to impose South Carolina's usury laws upon Beneficial. However, Delaware's usury laws govern the refund anticipation loans. Accordingly, insofar as these statutes, §§ 37-3-305 and 37-3-201(2), attempt to impose an interest rate limitation on a national banking association, they are preempted by § 85 of the National Bank Act. See supra parts I and II.

---

[16](Pls.' Am. Compl. at 8.)

One of the powers expressly granted to national banks by Congress is the power to lend money. 12 U.S.C. § 24 (Seventh). Congress, with limited exceptions, has granted the Office of the Comptroller of the Currency ("OCC") supervisory and enforcement authority over the affairs of national banks. 12 U.S.C. § 481. The exercise of the OCC's authority cannot be subject to state approval or regulation because to do so would allow the states to condition or restrict a national bank's power to engage in otherwise legal lending activity. As stated by the United States Supreme Court almost 100 years ago:

> [N]ational banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduction of their affairs is absolutely void wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal government to discharge the duties of the performance of which they were created.

McClellan v. Chipman, 164 U.S. 347, 357 (1896) (quoting Davis v. Elmira Savings Bank, 161 U.S. 275 (1896)). Therefore, South Carolina cannot control, by its posting

and filing requirements, the interest rates charged by Beneficial.

Finally, this court notes that in Marquette, the Supreme Court recognized that federal banking laws do inhibit the states' ability to regulate interest rates. The Court, however, stated that it was within the exclusive providence of Congress, and not the courts, to alter this situation:

> Petitioners' final argument is that the "exportation" of interest rates. . .will significantly impair the ability of States to enact effective usury laws. This impairment, however, has always been implicit in the structure of the National Bank Act, since citizens of one State were free to visit a neighboring State to receive credit at foreign interest rates. . . . But the protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of this Court.

Id. at 318-19 (citation and footnote omitted). In a similar manner, Cade is petitioning the wrong forum if he wishes to impose a state's usury laws on a national banking association.

THEREFORE, IT IS ORDERED that the motion of Beneficial for summary judgment as to the first, fourth, and fifth claims of Cade is **granted.**

IT IS FURTHER ORDERED that the motion of Beneficial for summary judgment as to paragraphs (b) and (d) of Cade's third claim is **granted.**

IT IS SO ORDERED.[17]

WILLIAM B. TRAXLER, JR.
UNITED STATES DISTRICT JUDGE

Greenville, South Carolina
July 14, 1993.

[17]The court reserves ruling on Block's motion to dismiss Cade's prayer for punitive damages. The parties may submit, within ten days of the filing of this order, additional memoranda specifically addressing the punitive damages issue with respect to the remaining claims.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA FLORENCE DIVISION

C/A No. 4:92-1454-21

BENJAMIN F. CADE, individually, and on behalf of all persons similarly situated,

Plaintiffs,

v.

H & R BLOCK INCORPORATED; BENEFICIAL NATIONAL BANK,

Defendants.

O-R-D-E-R

Before the court is the motion of the plaintiffs (collectively "Cade") for reconsideration of this court's previous orders granting summary judgment to the defendants.[1] Cade asks this court to reconsider the

---

[1]Specifically, the court issued two orders entered July 16, 1993, in which the defendants were granted summary judgment as to the first, fourth, and fifth claims of Cade, and paragraphs (b) and (d) of his third claim.

merits of his first claim which asserts a violation of 12 U.S.C. § 85. Cade contends that this court's ruling "was based upon an unintentional misapplication of Delaware law." Specifically, Cade argues that this court misapplied Del. Code Ann. tit. 5 § 963 (1992).

This court's holding was not based upon § 963. Instead, this court held that the $29 interest fee which Beneficial charges its borrowers is permitted under Delaware law pursuant to Del. Code Ann. tit. 5, § 965 (1992), and therefore is allowed under 12 U.S.C. § 85. See (Beneficial Order at 7.); (Block Order at 8-9).

Section 965 provides in relevant part as follows:

> In addition to or in lieu of periodic interest at a periodic percentage rate or rates permitted by §§ 963 and 964. . .a bank may charge and collect, as interest, in respect of a loan:
>
> (1) Loan fees, points, finders fees and other front-end and periodic charges; provided, however, that in the case of a loan to an individual borrower, no such front end or periodic charge may be charged and collected unless the agreement governing. . .the loan so provides;

Id. (emphasis added). It is undisputed that Beneficial's loan documents expressly provide for the collection of the $29 charge. Therefore, § 965 plainly permits Beneficial

to charge and collect, as interest, $29 on each refund anticipation loan. This type of interest charge falls within the definition of "interest" for purposes of 12 U.S.C. § 85. See Greenwood Trust Co. v. Com. of Mass., 971 F.2d 819,829 (1st Cir. 1992) (citing with approval several courts which have construed the term "interest" in § 85 as encompassing "a variety of lender-imposed fees and financial requirements which are independent of a numerical percentage rate"), cert. denied, ___ U.S. ___, 113 S.Ct. 974 91993).

THEREFORE, IT IS ORDERED that the motion of Cade for reconsideration of this court's previous orders granting summary judgment in favor of the defendant is **denied.**

IT IS SO ORDERED.

WILLIAM B. TRAXLER, JR.
UNITED STATES DISTRICT JUDGE

Greenville, South Carolina
August 17, 1993

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA FLORENCE DIVISION

C/A No. 4:92-1454-21

BENJAMIN F. CADE, individually, and on behalf of all persons similarly situated,

Plaintiffs,

v.

H & R BLOCK INCORPORATED; BENEFICIAL NATIONAL BANK,

Defendants.

O-R-D-E-R

I. INTRODUCTION

Presently before the court are Plaintiff Benjamin Cade's ("Cade") two claims[1] against Defendants H & R

---

[1]The court has previously granted summary judgment in favor of the Defendants with respect to Counts I, III(b), (d), IV, and V. See Cade v. H & R Block, Inc., C/A No. 4:92-1454-21 (July 16, 1993). Thus, the only claims currently before the court are Counts II and Counts III(a), (c), and (e)-(g) of the Amended Complaint.

Block ("Block") and Beneficial National Bank ("Beneficial") for: (1) violation of the Trust in Lending Act ("TILA") (codified at scattered sections of Title 15); and (2) unconscionability pursuant to S.C. Code Ann. § 37-5-108 (Law. Co-op. 1976). Block and Beneficial have moved the court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure with respect to these two claims. Concluding that there are no issues of material fact and that Block and Beneficial are entitled to judgment as a matter of law, the court **GRANTS** the Defendants' motion for summary judgment.[2]

II. THE FACTS

The material facts have been previously recited in prior orders and consequently will not be repeated at length here. At all material times, Cade electronically filed his federal income tax return through Block, which charges a filing fee of $35.00. Along with the electronic filing, Cade also sought and ultimately obtained a refund anticipation loan (RAL) under which he received from Beneficial a loan in the anticipated amount of his tax refund. Beneficial charges a flat fee of $29.00 for this front-end loan.

In order to obtain the RAL, Cade was required to complete a loan application and certification form provided by Beneficial. This application authorizes

---

[2]The parties have thoroughly briefed the issues, and therefore oral argument is unnecessary. See District of South Carolina Local Rules, Rule 12.08.

Beneficial to establish an account in Cade's name and to have the tax refund deposited into that account. By signing the application and certification form, Cade transferred to Beneficial an interest in the proceeds of the tax refund to the extent of the RAL. Subsequent to completing the application and certification form, Cade then simultaneously received: (1) the truth-in-lending disclosures stating the amount financed, the finance charges, and the annual percentage rate ("APR") charged by Beneficial; (2) the loan agreement, which provided that Cade would pay Beneficial the amount of the loan "on demand," and that a security interest in the tax refund would be created in favor of Beneficial; and (3) a check made payable to him, which represented the loan proceeds. Cade's endorsing the check demonstrated his asset to the terms of the loan and obligated him to repay it.

Cade now asserts in Count II of his Amended Complaint that Beneficial's calculation of the APR is so "grossly understated" that it amounts to a violation of TILA. Cade also contends that his not being furnished with the truth-in-lending disclosures until he received the loan agreement and check likewise violates the TILA because it is untimely. In the remaining allegations of Count III, Cade claims that these and other practices constitute unconscionable behavior in violation of state law. The court addresses these contentions in turn after stating the procedural standard.

III. DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Thus, the Rule requires that the court enter judgment against a party who, "after adequate time for. . .discovery fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The party seeking summary judgment shoulders the initial burden of demonstrating that there is no genuine issue of material fact. Id. at 323. Accordingly, to prevail on a summary judgment motion, the movant must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) that he is entitled to judgment as a matter of law. A fact is deemed "material" if proof of its existence or nonexistence would affect the disposition of the case under the applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence so offered is such that a reasonable jury might return a verdict for the non-movant. Id. at 257. In determining whether a genuine issue has been raised, the court must construe all inference against the movant and in favor of the non-movant. Id. at 257-58. On a summary judgment motion, the court "cannot try issues of fact; it can only determine whether there are issues to

be tried." Heyman v. Commerce & Indus. Inc., 524 F.2d 1317, 1319-20 (2d Cir. 1975). The non-movant, however, "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985). Rather, if the evidence "is so one-sided that one party must prevail as a matter of law," the court must enter summary judgment. Anderson, 477 U.S. at 251-252. Hence, the non-movant, to survive the motion, may not rest on the allegations averred in his pleadings; rather, he must demonstrate that specific, material facts exist that give rise to a genuine issue. Celotex Corp., 477 U.S. at 324.

Summary judgment serves the useful purpose of disposing of meretricious, pretended claims before the court and parties become "entrenched in a frivolous and costly trial." Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 58 (2d Cir. 1987). The courts, therefore, should not be reluctant to grant summary judgment in appropriate cases; indeed, summary judgment is mandated where appropriate. See, e.g., Herman v. City of Chicago, 870 F.2d 500, 404 (7th Cir. 1989); Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir.), cert. denied, 474 U.S. 829 (1985); United States v. Porter, 581 F.2d 698, 703 (8th Cir. 1978); Estate of Detwiler v. Offenbecher, 728 F. Supp. 103, 104 (S.D.N.Y. 1989); Burleson v. Illinois Farmers Ins. Co., 725 F. Supp. 1489, 1490 (S.D. Ind. 1989). In a recent trilogy of decisions--Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Anderson v. Liberty lobby,m Inc., 477 U.S. 242 (1986), and Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S.

574 (1986)--the Supreme Court has consistently reaffirmed its endorsement of pretrial resolution and summary disposition. These decisions reflect the mandatory nature of Rule 56. In Celotex Corp., the Court stated:

> The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'...Rule 56 must be construed with due regard not only for the rights of person asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of person opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual bases.

Celotex Corp., 477 U.S. 317 (1986) (citations omitted and internal quotation marks omitted). The law therefore compels that summary judgment be entered if the complainant's action cannot be maintained. Against this procedure standard, the court examines the merits.

A. Count II[3]

Pursuant to its grant of rule-making authority, see 15 U.S.C.A. § 1604 (West 1982), the Federal Reserve Board ("Board") has promulgated Regulation Z, 12 C.F.R. s 226 (1993) to implement the TILA. Regarding the Board and its regulations, the TILA provides:

> No provision of this section. . .imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

---

[3]The court notes that the allegations in Count II are vague and do not state that they are alleged pursuant to a specific section of the TILA, nor do they allege what section of the TILA the Defendants purportedly violated.

15 U.S.C.A. § 1640(f) (West 1982). The TILA via § 1640(f) therefore insulates a lender or creditor from liability provided he acted in good faith and in conformity with Regulation Z. See Warren v. Creditthrift, Inc., 599 F.2d 829, 831 (7th Cir. 1979) (holding that no liability attaches for violations of the TILA provided the "defendants. . .act in good faith conformity with Regulation Z"). Accordingly, if Block and Beneficial demonstrate their compliance with Regulation Z, Cade cannot prevail on Count II as a matter of law.

1. Calculation of the APR

Cade's first contention is that Beneficial inaccurately calculates the APR and that the actual APR is far greater than as represented. The threshold issue to be resolved is whether this loan is a demand loan. Here, the loan agreement provided that "[b]y endorsing this check above, you promise to pay us on demand the amount set forth in the 'Total of Payments' schedule on the attached check stub." (emphasis added). There is no other language in the agreement stating that this loan is anything but payable on demand. By its plain terms therefore, the instrument clearly stated that it was payable on demand. Accordingly, the court concludes that this is a demand loan.

The requisite disclosures with respect to a demand loan provide:

> If an obligation is payable on demand, the creditor shall make the

> disclosures based on an assumed maturity of 1 year. If an alternate maturity date is stated in the legal obligation between the parties, the disclosures shall be based on that date.

12 C.F.R. § 226.17(C)(5) (1993). Here, the APR was calculated in precisely this fashion--i.e.--as though it were due and payable one year from the date on which it was made; and Cade candidly admits this to be true. Because Beneficial has determined the APR in complete compliance with the applicable regulations, and Cade concedes this point, the Defendants are entitled to summary judgment with respect to this contention because there are no issues of material fact and the movant is entitled to judgment as a matter of law. See Moore v. Tower Loan of Mississippi, 487 F. Supp. 352, 356 (N.D. Miss. 1980) (holding that if APR is calculated according to regulations, such calculation is proper and thus a defendant who complied with the regulations was entitled to summary judgment); see also Fed. R. Civ. P. 56(c).[4]

2. Timeliness of Disclosures

---

[4]Although Cade had not argued the point, the court also concludes that Cade cannot avail himself of the "alternate maturity date" exception in 12 C.F.R. s 226.17(c)(5) because there is no alternate maturity date provided in the terms of the loan agreement. See 12 C.F.R. Pt. 226, Supp. I, cmt. 17(c)(1)-17; 12 C.F.R. Pt. 226, Supp. I, cmt. 17(c)(5)-1. Here, there is nothing in the terms of the loan agreement providing for an alternate maturity date, and such a date is not established by customer or practice. See id.

Cade's next contention is that Beneficial did not timely make the requisite truth-in-lending disclosures prior to consummation of the loan as required by 12 C.F.R. S 226.17(b). The truth-in-lending disclosures were made when Cade was presented with the loan agreement and the check. Cade apparently asserts, however, that the disclosures should have been revealed prior to this time, presumably when he completed the application and certification form. Conversely, the Defendants contend that the disclosures were timely when made because it was not until that time that the loan was actually consummated. Regulation Z provides that a loan is consummated at "the time that a consumer becomes contractually obligated on a credit transaction." 12 C.F.R. § 226.2(a)(13)(1993). Thus, consummation is characterized as occurring "when the lender and borrower sign a contract obligating them, respectively, to lend and to borrow the funds." Murphy v. Empire of America, FSA, 746 F.2d 931, 934 (2d Cir. 1984). Accordingly not until the parties actually sign the loan agreement, not any preliminary instruments, does consummation occur.

The case law rejects Cade's interpretation. For example, in Waters v. Weyerhaeuser Mortgage Co., 582 F.2d 503 (9th Cir. 1978), the debtors, who sought a home loan, were not presented with the truth-in-lending disclosures until closing, at which time they also received the deed of trust and the deed of trust note. Id. at 504. The debtors contended that disclosures made at the closing were untimely under the TILA, id., but the Ninth Circuit squarely rejected this contention, id. at 505. The

court observed that it had "found no case which has held that disclosure at the time of closing is untimely," and after surveying the history of Regulation Z, concluded "that disclosure at time of closing satisfies the requirement of [the TILA]." Id. See also Bissett v. Colonial Mortgage Corp., 477 F.2d 1245, 1246-48 (D.D.Cir. 1973) (holding that truth-in-lending disclosures need not be made until closing); Puckett v. Georgia Homes, Inc., 369 F. Supp. 614, 618 (D.S.C. 1974) (holding that truth-in-lending disclosures made January 16, the date on which the contract was executed, were made "at the appropriate time," and were not required to be disclosed on January 12, the date that the credit application was completed).

The decisional law therefore compels this court to hold that Beneficial's truth-in-lending disclosures were timely when made.[5] Even if the law did not compel this result, common sense would. Prior to the date of disclosure, Cade had merely completed an application and certification form. This instrument, while detailing the events that would occur if the loan were approved, did not obligate Beneficial to extend the loan or Cade to accept it. Rather, this application merely determined whether a RAL would be available to Cade. In short,

---

[5]In his brief, Cade invites the court to sustain the argument of a consumer group that the disclosures are untimely. See Cade's Response to Defendants' Motion for Summary Judgment, at 6-7. While there may be some merit to this argument, this court is compelled to follow the law, not the policy considerations of a special interest group. Cade's contentions are best addressed to Congress.

this application and certification was not a consummation of the contract, but merely a preliminary instrument, because id did not compel the parties to make or accept the loan. This court therefore holds that any contention of untimeliness with respect to truth-in-lending disclosures fails. Both prongs of Count II of the Amended Complaint having failed, the court grants the Defendants' motion for summary judgment with respect to this court.

B. Count III

The court has previously granted summary judgement in favor of the Defendants with respect to paragraph (b) and (d) of Count III. The Defendants have now moved for summary judgment with respect to the remaining paragraphs. Count III generally alleges that the Defendants' loan practices are unconscionable under South Carolina law pursuant to S.C. Code Ann. s 37-5-108 (Law. Co-op. 1976), and then proceeds to describe this alleged unconscionability in separate paragraphs. The court addresses these remaining paragraphs seriatim.

1. Paragraph (a)

Paragraph (a) avers that the Defendant's conduct is unconscionable because Defendants knew that there was no reasonable probability that Cade would be able to repay his loan. Although Cade not does state pursuant to what subsection of section 37-5-108 this allegation is brought, the court presumes it is brought under subsection 37-5-108(4)(a), which provides that in assessing

unconscionability in a consumer credit transaction, the court must consider the "belief by the ...lender at the time a transaction is entered into that there is no reasonable probability of payment in full of the obligation by the...debtor[.]"

This court has found no reported decision by the Fourth Circuit Court of appeals, the District of South Carolina, nor the South Carolina courts construing this section. Thus, no precedent compels a conclusion. The court concludes, however, that Defendants are entitled to summary judgment with respect to this paragraph because Cade has not met his procedural burden of presenting any evidence to prove this claim. Rather, the record reveals just the opposite because Cade has repaid all of his loans; moreover, that Beneficial would lend sums of money on the premise that it would not be repaid strains credulity. Therefore, the Defendants are entitled to summary judgment with respect to Count III(a).

2. Paragraph (c)

Cade alleges in paragraph (c) that the Defendants have taken advantage of him because of mental or physical impairment. Again, Cade does not state that he prosecutes this claim pursuant to a specific subsection, but the court presumes that it is brought under subsection 37-5-108(4)(e), which provides that a lender's knowingly taking advantage of a debtor's "physical or mental infirmities, ignorance, illiteracy, inability to understand the language of the agreement, or similar factors" is a consideration in assessing unconscionability.

To prevail under this subsection therefore, Cade must produce evidence that he is physically or mentally impaired and that the Defendants knowingly took advantage of this fact.

The record belies Cade's assertion of any infirmity. There is no evidence before the court tending to demonstrate that Cade is physically or mentally impaired. Rather, Cade unequivocally stated in his deposition that he did not suffer from any physical or mental infirmities. Also, the record reveals that Cade has received types of training while in the armed forces and while working in a hospital. Cade has not offered any evidence that he is ignorant, illiterate, or unable to comprehend the terms of the loan agreement. Additionally, there is no showing of any overreaching on behalf of Block or Beneficial. Having done nothing to refute the facts showing that Cade is physically and mentally sound, summary judgment will be entered in favor of Defendants with respect to Count III(c).

3. <u>Paragraph (e)</u>

Paragraph (e) avers that the Defendant did not timely disclose the terms, conditions, and APR of the loan and that when disclosure was made, the APR was grossly understated, all in violation of state law. These are the same allegations averred in Count III. Again, Cade does not state the case or statute that Defendants' behavior allegedly violates, but the court presumes that Cade refers to section 37-3-301, which is the state counterpart of the federal TILA. Section 37-3-301 states that "[a]

person upon whom the Federal Truth in Lending Act imposes duties or obligations shall make or give to the consumer the disclosures, information and notices required of him by that act and in all respects comply with that act." S.C. Code Ann. § 37-3-301. Accordingly, the Defendants are entitled to summary judgment with respect to Count III (e).

4. Paragraph (f)

In paragraph (f), Cade alleges that the Defendants did not offer a right of prepayment of the loan, yet the received prepayment without rebating any interest that he paid. Cade contends that this violates S.C. Code Ann. section 37-3-209 (Law. Co-op. 1976), which provides that subject to certain conditions, a "debtor may prepay in full the unpaid balance of a consumer loan, refinancing, or consolidation at any time without penalty."

In its prior orders, this court held that 12 U.S.C.A. § 85 (West 1989), permits Beneficial to charge whatever interest rate on a loan is permitted by Delaware law and that South Carolina law is preempted to the extent that it is contrary. Thus, this court has previously held, with respect to when the loan is entered, that § 85 preempts any purported limitation that South Carolina law might seek to impose on the interest rate. To hold that South Carolina law would compel a rebate on final payment of the loan is inherently inconsistent. The preemptive effect of § 85 remains constant and does not fluctuate with respect to timing. Therefore, because § 85

preempts this claim, Defendants are entitled to summary judgment with respect to Count III(f).

5. Paragraph (g)

Paragraph (g), like its predecessors, does not state pursuant to what subsection of section 37-5-108 it is brought, but alleges that Cade received no benefit from paying the $35.00 fee to have his return electronically filed. Subsection 37-5-108(4)(b) provides that in determining unconscionability in a consumer credit transaction, the court shall consider "in the case of consumer credit sale, consumer lease, or consumer rental-purchase agreement, knowledge by the seller or lessor at the time of the sale or lease of the inability of the consumer to receive substantial benefits from the property or services sold or leased[.]" By its express terms, this subsection only applies to credit sale, leases or rental-purchase agreements. Here, by contract, the transaction is a loan. Hence, subsection 37-5-108(4)(b) does not even apply to this action. Cade's claim therefore does not come within the purview of the statute.

Even if Cade's claim could be characterized as coming within the ambit of this subsection, the claim still fails because the evidence demonstrates that Cade did receive a benefit from the transaction: "Cade desired the rapid refund, and continually sought them, so that he could subsidize a trip to a convention and to put a larger engine in his car. Apart from these concrete examples of a substantial benefit, the court observes that the purpose of a rapid refund is that the taxpayer may have fairly

immediate use and enjoyment of his money. Accordingly, Defendants are entitled to summary judgment with respect to paragraph (g) of Count III.

IV. CONCLUSION

Summary judgment is proper in this action because the material facts are not disputed and the Defendants are entitled to judgment in their favor as a matter of law. Cade has not proffered any evidence tending to demonstrate that he could prevail on either of the remaining two counts of his complaint. With respect to Count II, the court holds that the APR was calculated in accordance with Regulation Z and that the truth-in-lending disclosures were timely made; hence, Defendants are entitled to summary judgment on this count. Regarding Count III, Cade has failed to elicit any proof of substantiate his numerous allegations. Even if Cade had offered such evidence, paragraphs (e), (f), and (g) fail as a matter of law. The Defendants are entitled to summary judgment with respect to the remaining paragraphs of Count III. Therefore, the Defendants' motion for summary judgment is GRANTED.
IT IS SO ORDERED.

WILLIAM B. TRAXLER, JR.
UNITED STATES DISTRICT JUDGE

Greenville, South Carolina
November 4, 1993.